Supreme Court, U.S.
FILED
NOV 3 1999
OFFICE OF THE CLERK

No. 99-390

In the Supreme Court of the United States

SHARON PAULK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 33 U.S.C. 702c, which provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place," bars petitioner's tort action against the United States for the drowning of her son resulting from the allegedly negligent failure to warn of hidden dangers created when a culvert became submerged after its gate was opened as a flood control measure.

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OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. A1-A4) is unpublished, but the decision is noted at 187 F.3d 637 (Table). The opinion of the district court (Pet. App. A5-A23) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1999. The petition for a writ of certiorari was filed on September 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 28, 1995, petitioner's son drowned when flood waters apparently forced him into a culvert that runs under a levee road between the Tennessee River

and the I-40 flood water impoundment area. Pet. App. A1, A10-A11. The accident occurred in the Tennessee National Wildlife Refuge (TNWR), an area owned by the United States with title vested in the Tennessee Valley Authority (TVA). *Id.* at A7-A8. TNWR is managed jointly by the United States Fish and Wildlife Service (FWS) for wildlife purposes, and by TVA for flood control purposes.[1] *Id.* at A8. The culvert in which the accident occurred is part of a water control structure that is used both for wildlife management and flood control purposes. A gate in front of the culvert on the impoundment side of the levee controls the level of water in the impoundment. *Id.* at A8-A9, A16-A17.

The Tennessee River flows in a northerly direction and is itself part of an impoundment known as Kentucky Lake, which is formed by the Kentucky Dam to the north and Pickwick Dam to the south. Pet. App. A9. When there is danger of flooding below the Kentucky Dam, TVA prevents the dam from releasing water. Kentucky Lake as well as its surrounding area —including the I-40 impoundment—are flooded and used as storage for excess water. *Ibid.*

The Ohio, Missouri, and Mississippi Rivers experienced massive flooding in May 1995. Pet. App. A9. During the week before the accident, acting in part upon information he received from TVA, the manager of TNWR ordered all the watergates and water control devices in the refuge opened as a flood control measure

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[1] The refuge is deeded to TVA, but by agreement TVA has granted FWS the authority to manage the refuge. Under the agreement, however, TVA retains authority to "make any changes necessary or desirable in the facilities for the storage, use, or distribution of water . . . as it may deem necessary to carry out its program of flood control by water storage in the reservoir." Pet. App. A16 (quoting declarations).

and to minimize damage to TNWR. *Id.* at A10, A21. Because the gate of the culvert in which the accident occurred had already been opened for wildlife management purposes in April 1995, Mr. Taylor simply ordered that it remain open. *Id.* at A10. On the day of the accident, high water levels obscured the view of the culvert, and petitioner's son drowned when water apparently forced him into the culvert. *Ibid.*

2. Petitioner filed this action against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.*, in the United States District Court for the Western District of Tennessee; she alleged that the federal government negligently failed to warn of the hidden danger created by the submerged culvert, resulting in her son's death. Pet. App. A6, A12. The United States moved to dismiss the complaint for lack of subject matter jurisdiction, see Fed. R. Civ. P. 12(b)(1), arguing that the United States is immune from liability under the Flood Control Act of 1928, 33 U.S.C. 702a *et seq.* Section 3 of the Act provides: "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. 702c.

The district court granted the government's motion to dismiss. Pet. App. A23. Relying on this Court's decision in *United States* v. *James*, 478 U.S. 597 (1986), and the Sixth Circuit's decision in *Cantrell* v. *United States*, 89 F.3d 268 (1996), the district court concluded that the Flood Control Act's immunity provision applied. Pet. App. A21. The district court noted that in *James*, this Court interpreted the terms "flood" and "flood waters" in Section 702c to apply to "all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control." *Id.* at A12 (quoting

James, 478 U.S. at 605). Like petitioner, the plaintiff in *James* alleged negligent failure to warn to which this Court responded: "We think * * * that the manner in which to convey warnings, including the negligent failure to do so, is part of the 'management' of a flood control project." 478 U.S. at 610.

The district court also explained that in *Cantrell*, the Sixth Circuit "made clear that neither the general purpose of the land where an injury occurs, nor the exact location of the injury, is controlling." Pet. App. A17. Rather, the Sixth Circuit concluded that immunity applies where the "act constituting part or all of the alleged breach of duty of care was an act undertaken to control flooding." *Ibid.* (quoting *Cantrell*, 89 F.3d at 269). In *Cantrell* the plaintiff had sought relief solely on the theory that his injuries were caused by the negligence of the pilot of a government rescue boat, not by the government's flood control activities. *Cantrell*, 89 F.3d at 273.

Reviewing the facts of the instant case, the district court found that the decision to keep the gate open constituted flood control management because such action "was made necessary by the backup of waters in the Kentucky Dam." Pet. App. A21. The district court also found that "it cannot be disputed that the waters which caused [petitioner's son] to drown were 'floodwaters' carried through a federal flood control project, even if arguably the place where the accident occurred was not a flood control project." *Ibid.* Accordingly, the district court held that Flood Control Act immunity applied. Even though the accident arguably did not occur on a federal flood control project and the primary purpose of the water control device was wildlife management rather than flood control, the alleged tortious act—the decision to open the gate without warning of potential

hidden dangers—was undertaken to control flooding. *Id.* at A20-A21.

The court of appeals adopted the opinion of the district court in an unpublished decision.[2] Pet. App. A1-A4.

ARGUMENT

This Court resolved the scope of immunity Congress intended under the Flood Control Act in *James*. Petitioner presents no compelling reason for the Court to revisit its controlling statutory precedent and the courts of appeals are not divided on the question of Flood Control Act immunity. Essentially, petitioner quarrels with the district court's application of Sixth Circuit law to the facts of her case. No further review is warranted.

1. As this Court explained in *United States* v. *James*, 478 U.S. 597 (1986), when Congress embarked in 1928 upon a major program to construct dams and other structures for flood control, one of the issues it faced was the scope of the federal government's immunity from liability for damages resulting from its flood control activities. See *id.* at 607-608. Congress limited the government's financial exposure by including in the 1928 legislation a provision that "[n]o liability

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[2] The court of appeals briefly addressed two additional issues. Recognizing that *James* "is still good law today," the court rejected petitioner's argument that the district court should have relied on the dissent in *James* instead of the majority opinion. Pet. App. A3. The court declined to address petitioner's argument that the immunity provisions of the Flood Control Act had been repealed impliedly by the subsequent passage of the Federal Tort Claims Act, because the issue was raised for the first time on appeal. *Id.* at A3-A4 (also noting that the same argument has been rejected by other circuits).

of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. 702c. This Court construed this clear assertion of immunity to extend both to property damage and to personal injury. See *James*, 478 U.S. at 605. The Court interpreted the terms "'flood' and 'flood waters'" to apply to "all waters contained in or carried through a federal flood control project for purposes of or related to flood control." *Ibid.* The "sweeping language" of Section 702c and the "equally broad and emphatic language" of its legislative history supported "attributing to the unambiguous words of the statute their ordinary meaning." *Id.* at 608.

Since *James*, courts have applied Flood Control Act immunity in a number of contexts. See notes 3-4, *infra*. Though, as the district court noted, results under the immunity rule may at times "seem[] unduly harsh" (Pet. App. A22), the author of the dissenting opinion in *James* has subsequently acknowledged that any change to the immunity rule must come from Congress. See *Hiersche* v. *United States*, 503 U.S. 923, 926 (1992) (Table) (Stevens, J., respecting the denial of the petition for writ of certiorari) ("Congress, not this Court, has the primary duty to confront the question whether any part of this harsh immunity doctrine should be retained.").

2. Though petitioner urges this Court to grant her petition so that it may review "the division of standards between the [c]ircuits" (Pet. 12), the courts of appeals are not truly divided on this issue. All the courts of appeals have followed the rule of *James* and applied the Flood Control Act's immunity provision where some nexus exists between government flood control activities and the damage to the plaintiff. The Sixth Circuit itself noted that "the differences between the circuits

have more to do with the facts of the particular cases * * * than with a dispute about the meaning of § 702c," *Cantrell*, 89 F.3d at 272, and observed that "indeed, we have found no case whose facts and ultimate holding may not be reconciled with our method," *id.* at 273. In a number of cases involving injuries with a nexus to federal flood control projects, courts of appeals have held that the government is immune from suit.[3] In

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[3] *Central Green Co.* v. *United States*, 177 F.3d 834 (9th Cir. 1999) (government immune from suit where property damage was caused by subsurface and surface water flooding from a canal of the Central Valley Project which has flood control as one of its congressionally authorized purposes); *Merritt* v. *United States*, 121 F.3d 716 (9th Cir. 1997) (Table) (government immune from suit where injury was not "wholly unrelated" to the use of a federal flood project), cert. denied, 118 S. Ct. 1301 (1998); *Washington* v. *East Columbia Basin Irrigation Dist.*, 105 F.3d 517 (9th Cir.) (government immune from suit for property damage not "wholly unrelated" to an irrigation channel of the Columbia Basin project which had flood control as one of its purposes), cert. denied, 118 S. Ct. 364 (1997); *Reese* v. *South Fla. Water Management Dist.*, 59 F.3d 1128 (11th Cir. 1995) (government immune from suit in drowning at federal flood control lake caused by opening of water control device); *Boudreau* v. *United States*, 53 F.3d 81 (5th Cir. 1995) (based on facts of case, government immune from suit where there was a "sufficient association" between injury to recreational boater during Coast Guard rescue and activities of flood control), cert. denied, 516 U.S. 1071 (1996); *Holt* v. *United States*, 46 F.3d 1000 (10th Cir. 1995) (government immune from suit where there was a "sufficient nexus" between car accident and mist, which was created by water released from flood control project's dam, and caused an ice slick on an adjacent road); *Fisher* v. *United States Army Corps of Engineers*, 31 F.3d 683 (8th Cir. 1994) (government immune from suit where shallow level of water as a result of operation of a flood control project was a "substantial factor" in a recreational diving accident); *Thomas* v. *United States*, 959 F.2d 232 (4th Cir. 1992) (Table) (government immune from suit in recreational diving accident occurring at lake which despite its

other cases, involving activities unrelated to the projects' flood control functions, or waters found not to be "flood waters" within the meaning of Section 702c, courts of appeals have rejected the United States' immunity defense.[4] The linguistic differences in the

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commercial uses, had flood control uses as well); *Hiersche* v. *United States*, 933 F.2d 1014 (9th Cir. 1991) (Table) (government immune from suit where flood waters were "substantial factor" in death of professional diver inspecting dam's underwater fish screens), cert. denied, 503 U.S. 923 (1992); *Zavadil* v. *United States*, 908 F.2d 334 (8th Cir. 1990) (government immune from suit where water level at Gavins Point Dam, a part of a flood control project, was a "substantial factor" in a recreational diving accident), cert. denied, 498 U.S. 1108 (1991); *Fryman* v. *United States*, 901 F.2d 79 (7th Cir.) (government immune from suit for injuries sustained at lake created as part of a flood control project which "increase[d] the probability" of injury), cert. denied, 498 U.S. 920 (1990); *Dawson* v. *United States*, 894 F.2d 70 (3d Cir. 1990) (government immune from suit for recreational swimming accident caused by unsafe depth of water due in part to releases of water for flood control purposes); *Dewitt Bank & Trust Co.* v. *United States*, 878 F.2d 246 (8th Cir. 1989) (government immune from suit where management of shallow waters at a flood control project was a "substantial factor" in causing injuries sustained in diving accident), cert. denied, 494 U.S. 1016 (1990); *Mocklin* v. *Orleans Levee Dist.*, 877 F.2d 427 (5th Cir. 1989) (government immune from suit for drowning caused by deep water in a flotation channel that had been excavated for a flood control project); *McCarthy* v. *United States*, 850 F.2d 558 (9th Cir. 1988) (government immune from suit where swimmer's injury from dive into shallow water of federal flood control project was not "wholly unrelated" to the management of that project), cert. denied, 489 U.S. 1052 (1989).

[4] See *Kennedy* v. *Texas Utils.*, 179 F.3d 258 (5th Cir. 1999) (no immunity where injury occurred on dry land due to a condition with no association to flood control); *Cantrell* v. *United States*, 89 F.3d 268 (6th Cir. 1996) (no immunity from claim by recreational boater injured by allegedly negligent driver of Army Corps of

standards applied by the courts of appeals have not produced any conflicting outcomes in cases.[5]

3. Petitioner's fundamental challenge, that the district court incorrectly applied the Sixth Circuit's decision in *Cantrell* (Pet. 12), provides no basis for review. In *Cantrell*, the Sixth Circuit held that where the plaintiff sought relief solely on the theory that his injuries were caused by the negligence of the driver of a government rescue boat—and not by the government's flood control activities—Flood Control Act immunity

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Engineers' boat); *Henderson* v. *United States*, 965 F.2d 1488 (8th Cir. 1992) (no immunity in death of fisherman where drowning was caused by release of water, at direction of private power company, from dam operated for hydroelectric power generation); *Boyd* v. *United States*, 881 F.2d 895 (10th Cir. 1989) (no immunity for allegedly negligent failure to warn swimmers of hazard from boats, in death of snorkeler struck by privately operated power boat at flood control lake); *E. Ritter & Co.* v. *Department of the Army*, 874 F.2d 1236 (8th Cir. 1989) (no immunity for erosion caused by rain waters that had not yet come in contact with flood control project); see also *Williams* v. *United States*, 957 F.2d 742 (10th Cir. 1992) (concluding, on basis of record evidence and language of authorizing statute, that particular project was not a flood control project).

[5] Petitioner does not argue that this case would have been decided differently under any other courts of appeals' approach. Indeed, it appears that in the present case the same result would have been reached under any approach. For example, the injury was "not wholly unrelated" to a project with flood control as one of its purposes. *Washington* v. *East Columbia Basin Irrigation Dist.*, 105 F.3d 517, 520 (9th Cir.), cert. denied, 118 S. Ct. 364 (1997). Furthermore, "governmental control of flood waters was a substantial factor in causing" petitioner's son's injuries. *Dewitt Bank & Trust Co.* v. *United States*, 878 F.2d 246, 247 (8th Cir. 1989), cert. denied, 494 U.S. 1016 (1990). And the injury was certainly "more likely" because of the "activities or characteristics" of a flood control project. See *Bailey* v. *United States*, 35 F.3d 1118, 1124 (7th Cir. 1994).

did not apply. See *Cantrell*, 89 F.3d at 273. The court explained that "[i]nstead of focusing on the injury (or its location), we focus on the particular tortious act for which the plaintiff is trying to hold the government liable." *Ibid.* If the act is not part of the government activity to control floods or flood waters, then Flood Control Act immunity does not apply.

Far from disagreeing with the Sixth Circuit, petitioner actually advocates the Sixth Circuit's approach for determining the applicability of Flood Control Act immunity and asks this Court to assign error to the district court's application of *Cantrell*'s standard. Pet. 12. However, this Court is not the appropriate forum for that claim. Under *James* as well as *Cantrell* the district court and court of appeals correctly concluded that Flood Control Act immunity applied because the alleged tortious act—the decision to keep the gate to the culvert open without warning of hidden danger—was related to flood control measures. Pet. App. A2, A21.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1999